

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTER FOR BIOLOGICAL)
DIVERSITY; CASCADIA WILDLANDS;))
PACIFIC COAST FEDERATION OF)
FISHERMEN'S ASSOCIATIONS;)
INSTITUTE FOR FISHERIES)
RESOURCES; NATIVE FISH)
SOCIETY;)

Plaintiffs,)

v.)

PETER DAUGHERTY, in his)
official capacity as Oregon)
State Forester; KATHERINE)
SKINNER, in her official)
capacity as District Forester)
for the Tillamook District;)
MICHAEL CAFFERATA, in his)
official capacity as District)
Forester for the Forest Grove)
District; DANIEL GOODY, in his)
official capacity as District)
Forester for the Astoria)
District,)

Defendants.)

and)

OREGON FOREST INDUSTRIES)
COUNCIL and TILLAMOOK COUNTY,)
Intervenor-Defendants.)

Case No. 3:18-cv-01035-MO

January 17, 2019

Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES

FOR THE PLAINTIFFS: Ms. Amy R. Atwood
Center for Biological Diversity
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FOR THE DEFENDANTS: Ms. Darsee Staley
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OREGON FOREST INDUSTRIES
COUNCIL: Mr. Ryan P. Steen
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FOR INTERVENOR DEFENDANT
TILLAMOOK COUNTY: Mr. Jay T. Waldron
Schwabe Williamson & Wyatt
1211 S.W. Fifth Avenue, Suite 1600
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ALSO PRESENT: Mr. Noah Greenwald

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1 (P R O C E E D I N G S)

2 (January 17, 2019; 10:40 a.m.)

3 THE CLERK: We're here today in Case No.
4 3:18-cv-1035-MO, Center for Biological Diversity, et al. v.
5 Daugherty, et al.

6 Counsel, please state your name.

7 MS. ATWOOD: Amy Atwood on behalf of the plaintiff.

8 MS. WESTON: Sarah Weston on behalf of the State
9 defendants.

10 MR. WALDRON: Jay Waldron on behalf of Tillamook
11 County.

12 MR. STEEN: Ryan Steen on behalf of the Oregon Forest
13 Industries Council.

14 THE COURT: Others should also introduce themselves.
15 Go ahead.

16 MS. STALEY: Good morning, Your Honor. Darsee
17 Staley, also for the State defendants.

18 MR. GREENWALD: Noah Greenwald with plaintiffs.

19 THE COURT: Let me give you my tentative thoughts on
20 the matters here before me. They're just tentative, so I'll
21 want to hear your oral arguments. And I should say that in the
22 course of making these remarks, I may end up describing what a
23 complaint should do instead of what this one actually does,
24 with a view towards moving towards the future in this case.

25 So there are several challenges to the complaint in

1 this case. The first is the straight-up Eleventh Amendment
2 challenge about retrospective declaratory relief. And so if
3 this were a complaint that sought retrospective declaratory
4 relief, that would violate the Eleventh Amendment. There can
5 be, in some cases, an exception where some sort of declaration
6 about past conduct by the State forms an integral part of
7 answering a question about future conduct, and so there may be
8 that exception out there to the Eleventh Amendment.

9 There are two things about this case that I think
10 make that less important here. One is that our plaintiff in
11 briefing -- not so much in the complaint. The complaint, I
12 think, certainly would leave one with the impression that
13 retrospective relief was being sought, but the plaintiff now
14 disavows seeking retrospective relief. So, to that degree, I
15 take plaintiff at its word, and so therefore I deny the motion
16 regarding the prohibition by the Eleventh Amendment for
17 retrospective relief, unless somehow I sort of misunderstood
18 plaintiffs' position.

19 I will say this about a complaint discussing past
20 behavior when it can only seek future injunctive relief, and
21 that is that it's, of course, a part of many, many complaints,
22 and it's an appropriate part of a complaint against a state to
23 sort of recite what has happened in the past as a step towards
24 proving the imminence of future harm.

25 So if you say, you know, that a particular form of

1 logging -- you know, helicopter logging in the past has always
2 resulted in these harms, and the State is about to engage in
3 helicopter logging and therefore the harm again is imminent,
4 you've just used the past to prove imminent future harm.
5 There's nothing that the Eleventh Amendment says that prohibits
6 that.

7 And I take it that much -- maybe all of what the
8 complaint in this case is saying about the past is to that end.
9 Is that about right?

10 MS. ATWOOD: Yes, Your Honor, that's right.

11 Just to round out that a little bit more, I wanted to
12 make a couple of things clear. The history in particular of
13 the National Marine Fisheries Service engaging with the ESU in
14 making its determination throughout the years happened multiple
15 times. It happened alongside the threats that were continuing.
16 And any of us who are from the Pacific Northwest know that
17 salmon are threatened by myriad threats.

18 But if you read the rules here, you'll come to see
19 that the service had determined multiple times, including after
20 challenges in court and the service making new listing
21 determinations, reiterated time and time again that the primary
22 threat, ongoing threat to this ESU is the impairment of its
23 fresh water habitat, and in particular the headwater streams
24 that coho salmon require.

25 And so we felt that it was important to pull out that

1 important history so that the Court could understand that, but
2 also for the purpose that you explained. And I would also,
3 just to supplement that, note that the special rule talks a lot
4 about some of the issues that the State is concerned about,
5 things like large woody debris and stream buffers. So all of
6 this was --

7 THE COURT: Thank you. I think that's all I need to
8 hear on this.

9 So unless the State or other actors otherwise here
10 have concerns, you've essentially gained what you sought by
11 this motion, in the sense of not being subjected to
12 retrospective relief.

13 Anything further you need to offer on this issue, on
14 the Eleventh Amendment issue?

15 MS. WESTON: Your Honor --

16 THE COURT: Go ahead.

17 MS. WESTON: We appreciate the Court's ruling on
18 that, and I guess we would just reserve the right to, if the
19 second amended complaint does contain a request for
20 retrospective relief, we'd reserve the right to raise this
21 issue again if it's necessary, although in light of the
22 Court's --

23 THE COURT: Well, you won't need to raise it again at
24 the pleading level. I suppose it could come up at summary
25 judgment somehow, but it's sort of hornbook law that having

1 disavowed in pleadings any attempt to seek retrospective
2 relief, plaintiffs are going to be barred by that. So it's not
3 going to come up again.

4 MS. WESTON: Thank you.

5 THE COURT: So that's my ruling on the Eleventh
6 Amendment.

7 The next argument defendants make against this
8 complaint is one that would seek to require plaintiffs to plead
9 the complaint on a sale-by-sale approach. And the argument is
10 really sort of a -- one that says that a complaint under
11 Section 9 has to be by a sale-by-sale approach in order to
12 state a claim. So I guess for both sides, my tentative views
13 are kind of good news-bad news.

14 So for plaintiff, the good news is I don't think
15 that's a per se rule. I don't think it's by definition
16 necessary to adopt a sale-by-sale approach in order to
17 adequately state a claim. And I'll confess that although it's
18 not really briefed this way, my analysis of this really falls
19 more under *Iqbal/Twombly* than something else. And I think
20 that's the right way to think about the complaint on this
21 score.

22 The bad news for plaintiff is that I do think this
23 complaint is at an improperly high level of generality and
24 doesn't sufficiently -- doesn't allege facts with sufficient
25 specificity under *Iqbal/Twombly* and doesn't really allow the

1 defendants to prepare a meaningful defense. It doesn't give
2 them the kind of specificity required.

3 So, in general, I think a complaint on this score --
4 what has to be avoided is a complaint that says, you know,
5 logging has damaged salmon habitat in a variety of ways in the
6 Northwest in the past, there's going to be logging on these
7 sites, therefore salmon habitat will be damaged.

8 And this complaint now comes perilously close to sort
9 of that proposition, and that's at a very high level of
10 generality. So certainly a sale-by-sale approach in which one
11 says this sale has these features about it that will trigger --
12 imminently trigger harms known to be caused by this kind of
13 logging on this sort of terrain is enough and will
14 satisfy *Iqbal/Twombly*.

15 Whether you can figure out a way to plead this
16 complaint without doing a sale-by-sale approach, that's up to
17 you, since I don't think it's absolutely required. I will
18 confess that I have a hard time seeing how you can get there
19 without a sale-by-sale approach. So I'm not sure what to say
20 about my tentative thoughts here, other than I think I would
21 deny a motion that requires a sale-by-sale approach, but I
22 would require plaintiffs to replead to be more specific, since
23 I don't think there's enough here to tee up a meaningful
24 defense.

25 With those tentative thoughts, I'll hear first from

1 plaintiff.

2 MS. ATWOOD: Sure, Your Honor. I do think I'm very
3 confident that we can get there. I would encourage the Court
4 to look at Judge Aiken's explanation of how, you know, timber
5 sales are planned and sold, and in the case of the Tillamook
6 and Clatsop State Forests, there are several layers, and one of
7 those is an annual operations plan and the other one is an
8 implementation plan.

9 THE COURT: I'm going to stop you there. So, first,
10 I think I have some understanding of that, as all of the
11 lawyers in the room here and myself have some understanding of
12 how these sales work, and, in fact, some general understanding
13 of the various ways in which salmon can be threatened by
14 threatening their habitat. So what is important to me here is
15 that that knowledge gets put on paper in the complaint.

16 And that's, I think, one of the flaws in the
17 complaint. It simply assumes a lot of things can be filled in
18 by a knowledgeable reader, but that's not what complaints are
19 obligated to do. So I think that's what's missing is the
20 complaint has to lay out with greater specificity how you know
21 that a particular sale, or at least a particular feature of the
22 landscape is threatened by a particular type of harvesting
23 activity.

24 MS. ATWOOD: What I was going to suggest to the Court
25 was that we could look at this on a watershed basis. Our chain

1 of causation alleges that the logging activities that are
2 ongoing and approved by the defendants increase the background
3 rate of landslides at the watershed level.

4 They also tend to plan their timber sales for the
5 coming year, for the coming term by watershed, and I think that
6 is -- if the Court would be okay with that, we would explore
7 pulling together some of those sales, which would avoid the
8 problems of the sale-by-sale approach but provide perhaps more
9 of the information that the Court is asking for.

10 THE COURT: Thank you.

11 For the defense?

12 MS. WESTON: Your Honor, I want to make sure that
13 we're on the same page. The State's motion was a motion to
14 make more definite and certain, which of course is analyzed
15 with a view towards the *Iqbal*/*Twombly* standards, but I want to
16 make sure we're all on the same page about what the motion was.

17 THE COURT: We are. We're just in federal court,
18 where motions to make more definite and certain are very
19 unpopular.

20 MS. WESTON: Fair enough. And this was not a motion
21 that the State made lightly, Your Honor, but this is a case
22 that is not a programmatic challenge. Plaintiffs have
23 disavowed that it's a programmatic challenge. Nothing in the
24 complaint suggested it's a programmatic challenge. It's an
25 as-applied challenge, and plaintiffs' complaint and their

1 response effectively says, well, it's as-applied, but we don't
2 have to tell you as applied how or where or what.

3 THE COURT: What is the level of specificity that you
4 think is required? Not optimal, just required.

5 MS. WESTON: Your Honor, I think because this case
6 involves a chain of causation that is attenuated in time and
7 attenuated in terms of the number of links in the chain, we
8 need as much specificity as we can get so we can know what
9 conduct they're talking about, where is that conduct occurring
10 and --

11 THE COURT: So let's take one of the harms,
12 landslides. You understand the end of the chain, right? You
13 understand the harm plaintiffs allege flows from landslides
14 into streams?

15 MS. WESTON: Well, I guess I have two answers to
16 that. One is that, you know, as a relatively knowledgeable
17 reader, I do understand that landslides can have impact on
18 streams, some of which are beneficial and part of the natural
19 disturbance regime that creates complex habitat, and some of
20 which are less beneficial. And we understand plaintiffs'
21 position to be that logging on some unspecified steep slopes
22 results in an increase in the rate of landslides for some
23 period of time after a timber harvest.

24 We don't understand what they mean by steep slopes,
25 we don't know which sales they allege both have those steep

1 slopes and are located in such a --

2 THE COURT: That's what I want to do is sort of work
3 backwards from the landslide itself back up the causal chain to
4 see where you think specificity is lacking.

5 So you don't know what "steep slopes" means. Are you
6 suggesting that the actual geographical terrain, you know, a
7 slope next to this stream on a particular bluff or mountainside
8 has to be identified in the complaint?

9 MS. WESTON: Your Honor --

10 THE COURT: This half acre right here can't be logged
11 for risk of landslides. Is that the specificity you think is
12 required?

13 MS. WESTON: Your Honor, like the Court, I have
14 difficulty imagining how, given the number of factors that
15 affect the likelihood of landslides -- and again, as a
16 knowledgeable reader -- the number of factors that affects
17 likelihood of landslides, the number of factors that affect
18 where that landslide ends up, the number of factors that affect
19 the characteristics of that landslide, whether it looks like a
20 landslide that occurs on unharvested land or not. Given all of
21 those factors that go into a landslide, and sort of going from
22 timber harvest to landslide to a significant enough impact on a
23 stream where coho are present at a critical life stage and an
24 impact that lasts long enough, it's difficult for me to imagine
25 something other than a sale-by-sale or location-by-location

1 description.

2 With that said, I suppose it's possible that
3 plaintiffs could say that any -- we allege and our expert
4 intends to testify that, you know, a slope of X steepness on X
5 kind of geological -- X kind of geological formations
6 underneath it with these other features that's within X
7 distance of a stream or on a flow path that's identified in
8 such a way that we know there's coho in that stream,
9 potentially you could get there that way. I guess --

10 THE COURT: Well, to do that, they'd have to
11 identify -- I guess what you're asking for is significantly
12 greater specificity on what "steep slope" means, right?

13 MS. WESTON: Significantly greater specificity on
14 what a steep slope means. And again --

15 THE COURT: And then some recitation in the complaint
16 grounded in some form of expert testimony. It wouldn't have to
17 be testimony retained in this case, but some established expert
18 testimony about distance from logging that might cause a
19 landslide to streams, right?

20 MS. WESTON: Well --

21 THE COURT: I think that's what I heard you say.

22 MS. WESTON: Well, I don't believe plaintiffs have to
23 plead their evidence. I think they have to plead their fact
24 that they intend to prove. So I don't know that they need to
25 recite that their expert is going to say this, although I

1 imagine --

2 THE COURT: I wasn't suggesting that they had to
3 recite a particular stream, just that you think the chain of
4 causation they must allege has to allege that logging on a
5 particular sort of slope, defined, can cause harmful
6 landslides, and that that's true because those landslides are
7 within some defined distance that will affect streams. Is that
8 what you said or am I misunderstanding?

9 MS. WESTON: That's part of what -- that is what I
10 said in talking about landslides. It may be helpful to think
11 of this in terms of the elements of a Section 9 claim, where
12 plaintiffs are going to need to allege and prove -- you know,
13 they need to identify what habitat they're talking about and
14 establish that there are listed species there at the material
15 time. They're going to need to allege and prove the nature and
16 attributes of the modification that they allege is occurring in
17 that particular habitat. They're going to need to allege that
18 that modification is so significant that it kills or injures
19 actual identified fish.

20 THE COURT: What do you mean by "actual identified
21 fish"?

22 MS. WESTON: Fish that exist in that stream. They
23 don't have to find a fish named Fred, but they need to be able
24 to establish the presence of the listed species at a critical
25 time. So, you know, if sediment buries gravel for some period

1 of time where there aren't eggs in the gravel, and then it's
2 washed away by -- before the next set of eggs come in, that
3 doesn't establish --

4 THE COURT: Why isn't that more summary judgment than
5 motion to dismiss? I mean, let's take, for example, the
6 suggestion made by plaintiff that they did this on a watershed
7 basis. So nothing in the complaint that alleges this harm on a
8 watershed basis will allow you -- will require them to say that
9 there are threatened salmon in a particular stream, and that
10 stream, that particular stream is close enough to a particular
11 steep slope that logging that slope might cause the harm. I
12 mean, certainly that sort of particularity would satisfy
13 anybody's definition of *Iqbal/Twombly*, but I've never seen ever
14 an environmental complaint have to pass through that sort of
15 filter to be specific enough.

16 So what's less than identifying a particular stream
17 but sufficient enough? I mean, you're the one who is saying
18 this is not specific enough. So what is specific enough?

19 MS. WESTON: Your Honor, the State's position is that
20 when we look at this complaint, we don't know which sales
21 they're seeking to enjoin. We don't know which --

22 THE COURT: I understand that, and I agree. What I
23 don't want to do is have them amend and not know how much they
24 need to amend and have you sit here and say, well, we're not
25 going to tell you how good it has to be, we'll just keep

1 challenging it until you hit some undefined magic mark.

2 What's a good enough complaint on the link of
3 causation? We're focusing right now on landslides, and I think
4 it's a good proxy for the various harms alleged in the
5 complaint.

6 What is specific enough? You can say it without
7 knowing whether plaintiffs can meet it. I mean, that's fair.
8 I'm not asking you to write their complaint for them. But what
9 is specific enough to pass muster here to state a claim that
10 satisfies both *Twombly* and be definite and certain enough on
11 the chain of causation between logging a hillside and a
12 landslide negatively affecting habitat?

13 MS. WESTON: Your Honor, the State defendants need to
14 be able to read the complaint and be able to discern from the
15 complaint which of their sales are implicated.

16 THE COURT: So if a complaint focuses on a watershed
17 and said sales in this watershed involve a watershed in which
18 the threatened species are present, and that when sales in this
19 watershed log on steep slopes, it increases the risk of
20 landslides flowing into streams, what they've already said
21 about the negative effects on salmon when it happens, then
22 can't you then go to that watershed, take a look at the sales
23 that are present, contest whether that's really happening here,
24 whether that harm is really imminent or not, and come back to
25 me at summary judgment?

1 MS. WESTON: Your Honor, without seeing such a
2 hypothetical complaint, it's a little difficult to say, but
3 potentially with landslides, if we understood what types of
4 slopes they were talking about and how direct the connection
5 between the location of the landslide and a stream -- not just
6 a stream but a stream where actually coho are living, because
7 coho don't live in all of the streams in a watershed, some of
8 the streams are too small for them to live in -- potentially
9 that would help. That would get us there with landslides.

10 With roads --

11 THE COURT: Let's just pick up that thought for just
12 a moment. Why isn't that something where that's just part of
13 your defense to say, they've made this somewhat general
14 challenge to logging on steep slopes in this watershed, but we
15 went and looked at this sale, and this sale doesn't involve
16 logging anywhere near any stream where coho are actually
17 present. Why can't that be your burden post-complaint instead
18 of a burden built into their allegations of the complaint?

19 MS. WESTON: Your Honor, because they're the
20 plaintiffs and they need to allege each of the elements of a
21 Section 9 claim. One of those elements is presence of a listed
22 species in habitat that's being modified.

23 And here because we have a modification that's not
24 occurring in the habitat -- or an activity that's not occurring
25 in the habitat, and this isn't sort of we're cutting down a

1 tree where a bird clearly lives that is listed, and this is,
2 you know -- there's a bunch of steps that are here, and so in
3 this case, unlike perhaps in some other kind of ESA case, the
4 State is prejudiced by not knowing exactly where and what we're
5 talking about.

6 And the Court obviously has some amount of discretion
7 in a more definite statement motion, and here, you know, trial
8 by ambush just isn't how it's supposed to work in federal
9 court, and the State shouldn't have to prove a negative to
10 figure out what it is that plaintiffs are seeking to enjoin in
11 this case.

12 THE COURT: All right. Thank you very much.

13 MR. WALDRON: Your Honor, may I just add a little
14 perspective to the questions you just asked?

15 THE COURT: Yes.

16 MR. WALDRON: Jay Waldron for Tillamook.

17 I think sometimes when we read complaints, we fail to
18 see the magnitude of what's at issue here. The Tillamook
19 Forest is 570 square miles. It is 100 square miles larger than
20 Multnomah County. There are seven, as Your Honor probably
21 knows, major rivers there, the Kilches, the Miami. There are
22 seven. There are many thousands of streams and tributaries in
23 the forest.

24 And, I mean, my clients live there, you know. As you
25 know from our pleadings, they depend on the forest for much of

1 their school funds and much of their county -- part of their
2 county budget. And just saying "landslide," for example, when
3 there's thousands of streams, some have coho, some -- most
4 don't.

5 And when you just say a landslide, landslides, Your
6 Honor, in Tillamook County, obviously, the whole -- about half
7 the county is steep slopes, and they're everywhere. There are
8 hundreds of square miles of steep slopes.

9 And to go a little bit that isn't in the briefing,
10 the -- when the implementation plan is done or the sale plan is
11 done, it's got incredible detail about where, when, how, what,
12 what effect on this slope, that slope, the next slope, this
13 water body, that water body. And I think what the attorney for
14 the State is trying to convey -- and I'm trying to convey,
15 also -- is there's no way to get the who, where, what, how.
16 There's -- *Palsgraf* is missing here.

17 THE COURT: I understand your point, it's just I'm
18 concerned that the same argument you're making about a
19 challenge that involves, you know, the whole forest or even the
20 whole watershed, you'd almost make the same argument with
21 regard to the whole sale. I mean, you could have a particular
22 sale, and you could say of that sale, you know, it involves a
23 lot of land with many slopes and many streams, and we still
24 don't know which one they're talking about.

25 I mean, why isn't your argument one that would

1 require the plaintiff to say, this stream has coho in it and X
2 feet away is a slope, if you log this slope, we believe there
3 will be a landslide to negatively impact, you know, at mile
4 marker whatever, this stream?

5 MR. WALDRON: Your Honor, I wouldn't disagree with
6 you if that was the type of specificity, because there's --

7 THE COURT: I'm asking if that's the type of
8 specificity you think is required by law.

9 MR. WALDRON: Yes. I think that somehow -- the
10 standard for liberal federal pleadings is it can't be
11 speculative. And I think, from talking to my clients, the way
12 the complaint is now, and even the way you said it, by
13 watershed, you're talking about hundreds of square miles that
14 could be in one of those watersheds. It's almost saying curves
15 in Multnomah County cause accidents.

16 THE COURT: Are you suggesting then that even a
17 sale-by-sale approach is not specific enough?

18 MR. WALDRON: I think that's specific enough, yes,
19 Your Honor.

20 THE COURT: Well, why? Why is that specific enough?
21 You still don't know which of many slopes and many streams is
22 involved. You just have to go figure it out on your own?

23 MR. WALDRON: Mr. Steen would probably know the
24 answer better, but most sales are 30 to 200 acres, and they're
25 in a specific -- I'm not much on being a forester, but they're

1 in specific areas, and if there was a sale listed, the
2 implementation plan is going to have every detail about that
3 area. And yes, then the State, Tillamook County, and OFIC
4 could defend that.

5 THE COURT: All right. Thank you.

6 Your response?

7 I'm sorry, Mr. Steen, go ahead.

8 MR. STEEN: Just a brief point to follow up on
9 Mr. Waldron. I agree that -- I can't see how it could be
10 anything other than a sale-by-sale, because I don't think you'd
11 have the specificity to tie what they're alleging will
12 happen -- which is injury or death of a coho salmon -- to the
13 specific activity. So there has to be some allegation of what
14 that activity is.

15 I think what guides this a little bit is the case
16 cited in the briefing, *Environmental Protection Information*
17 *Center v. Tuttle*. In that case you kind of had the reverse, in
18 that it involved California but still coho salmon, but it was a
19 challenge to the regulations and plans that governed timber
20 harvesting. And the Court rejected that and said that what the
21 plaintiffs needed to instead do was to bring a challenge to,
22 quote, site, a site-specific challenge to a timber harvest, and
23 that that would have the distinct and developed facts necessary
24 for the Court to hear a claim.

25 And I think that is instructive for this case here.

1 We need some allegations of where the activities are and what
2 they are going to be, for example, in a timber sale, that's
3 ultimately going to cause, as the plaintiffs have said, injury
4 or death of coho salmon. And that's I believe what is missing
5 from the complaint.

6 THE COURT: All right. Thank you.

7 MS. ATWOOD: Your Honor, may I respond?

8 THE COURT: Yes.

9 MS. ATWOOD: Well, first to respond to Mr. Waldron.

10 You can hear me okay?

11 I just wanted to point out -- I don't know if this is
12 the direction the Court is going, but we did include a table at
13 the end of our complaint with 65 timber sales. That complaint
14 was filed in June. Half of these sales have been logged or
15 sold. That alone represents the inherent difficulty of trying
16 to litigate this case on a sale-by-sale basis.

17 I would also just point out that in the table we
18 identify certain attributes of these sales that lends them to a
19 higher risk of landslides, and we also ensured that they were
20 upstream of coho -- occupied coho habitat.

21 I think that the -- to respond to Mr. Steen, the *EPIC*
22 *v. Tuttle* case is instructive, but it's a lot like a lot of the
23 other cases that do talk about this sort of Section 9 challenge
24 to ad hoc decision making. In other words, rather than going
25 for a challenge to a policy or, as the State puts it, a

1 program, we're going to look at the licensing decisions; we're
2 going to look at the types of consistent decision making that
3 the State is engaging in.

4 And so I actually think that *Tuttle* supports our
5 position, and from what I'm hearing, it doesn't sound like
6 Mr. Waldron would object to a watershed-by-watershed approach.

7 THE COURT: I mean, that's exactly what he objected
8 to. I don't know how you heard differently.

9 MS. ATWOOD: Well, he discussed how large the forest
10 is and how there are these various watersheds. And that is
11 consistent with what I was suggesting earlier, which is that
12 these decisions they make on a ten-year and an annual basis do
13 look at the watersheds. And our chain of causation alleges a
14 watershed -- almost a watershed-level impact, both in the form
15 of harm, and we also have alleged facts to support harassment.

16 Again, I understand this is not the direction that
17 the Court is going, but I just wanted to --

18 THE COURT: What is your obstacle to alleging a
19 sale-by-sale approach?

20 MS. ATWOOD: Well, as made evident by the fact that
21 half of the sales in our table have already been sold or
22 completely logged, I think it would be incredibly difficult for
23 the parties and the Court to manage a sale-by-sale approach
24 with discovery. We have a team of four experts to address
25 every single link in our chain of causation. To go through

1 both fact and expert discovery, summary judgment briefing, and
2 a trial to deal with sales that, in their view, are moot as
3 soon as they're sold, I just don't see how that's the best use
4 of anyone's time.

5 THE COURT: So you're just saying that the sales are
6 completed before you can litigate them?

7 MS. ATWOOD: Well, that's what they're saying. Yes,
8 that's right, Your Honor. And they're saying that they're moot
9 because they've already been sold. In other words, the legal
10 ownership permission was transferred to the operator.

11 THE COURT: Why isn't that the whole point of future
12 injunctive relief that would prevent the sales from being
13 mooted while it's being litigated?

14 MS. ATWOOD: I'm sorry, I don't understand the
15 question, Your Honor.

16 THE COURT: Well, if what you're seeking, if you have
17 a complaint that alleges multiple sales and alleges imminent
18 harm and seeks injunctive relief, then why couldn't you at the
19 same time to solve that problem seek preliminary injunctive
20 relief in order to litigate the imminent harm on a permanent
21 basis?

22 MS. ATWOOD: Your Honor, we have considered that
23 seriously and it's not an option we've taken off the table, but
24 given the experience in the *Pacific Rivers Council v. Brown*
25 case, it seems to us that in that case Judge Brown was

1 concerned with the absence of enough factual development in the
2 PI context to grant the PI. And so we are not trying to
3 over-litigate this case, but we want to make sure that the
4 Court has everything that it needs order to make a decision on
5 the merits.

6 THE COURT: All right. Thank you.

7 MS. WESTON: Your Honor, can I just make one -- the
8 State's position is not that the sales are moot once they are
9 sold. I mean, those contracts run for a number of years
10 because there's a certain amount of preparatory work, where
11 they do some road maintenance and then the harvest happens and
12 then hauling. Our position is once the trees are all cut down
13 and have been hauled out of the woods, there's nothing for the
14 Court to order.

15 And so with respect -- with respect, I think the
16 Court could probably get through this litigation in less than a
17 three-year contract term. The next round of sales is going out
18 for public comment in March. If the Court gave the plaintiffs
19 until the end of March to amend their complaint, we could
20 include proposed sales from that round and we would have some
21 specific facts for us to work with and --

22 THE COURT: Thank you.

23 Well, I've said, and I still maintain that there's
24 nothing in the law that requires a sale-by-sale approach as
25 some sort of statutory or regulatory requirement, but a certain

1 level of specificity is required by pleading standards in
2 federal court, if nothing else. And the ultimate goal is to
3 have a set of pleadings that allows a defendant to undertake a
4 defense, and this complaint, in my view, fails to do that.

5 And I think the level of specificity, while not --
6 while not stream by stream -- that's I don't think required at
7 all -- does require the ability to have a manageable piece of
8 terrain that the defendants can then go investigate whether
9 what's alleged in the complaint is really what is going to
10 happen on a manageable piece of terrain. And if that terrain
11 is too large, then it can't be done. It can't be done if
12 it's -- in any reasonable period of time or in some instance
13 probably not humanly possible if the piece of terrain is too
14 large.

15 So we use proxies for just this abstract requirement
16 of specificity, and in this case I agree that the complaint has
17 to allege a sale-by-sale approach using sales as an adequate
18 proxy for the kind of specificity that narrows down the terrain
19 in question to allow a meaningful undertaking of the defense.

20 So I grant the motion against the complaint, and I
21 will allow repleading, but require the pleading to take place
22 on a sale-by-sale basis.

23 The principal rationale for not undertaking a
24 sale-by-sale approach is not that it can't be done in terms of
25 the specificity of the complaint, but rather that it allows a

1 sort of a -- it's almost a -- it's not quite, but it's almost
2 sort of a capable of -- capable of evaluation but evading
3 review sort of problem. And I don't want to do that, and so I
4 will undertake to make sure the case advances rapidly enough,
5 and I will keep in mind the obstacles to plaintiff in trying to
6 litigate a number of sales before they sort of slip away from
7 the Court's limited jurisdiction in a case like this.

8 But I still think, and I do hold that that level of
9 specificity is what I would require in a future complaint.

10 The next argument I need to evaluate is that --

11 MS. ATWOOD: Your Honor --

12 THE COURT: Yes?

13 MS. ATWOOD: May I ask just a point of clarification
14 about the sale-by-sale approach?

15 THE COURT: Of course.

16 MS. ATWOOD: Would the Court prefer that we identify
17 the sales and assign a claim to each sale, or would you rather
18 that we include the sales, as we have here, in a table format
19 and say in one claim, for example, that these are the sales
20 with the features that are reasonably certain to result in harm
21 and harassment?

22 THE COURT: There's nothing wrong with the latter
23 approach as long as it's not generic.

24 If you identify, you know, a group of five sales --
25 just pulling a number out of thin air -- that in your view

1 could be alleged individually, each with a particular claim for
2 the particular harm, but the claims are the same statutory
3 framework and involve the same factual harm that you want to
4 allege, then you can group them. That's fine. I just don't
5 want you to use grouping as a way of not being specific about
6 claim-by-claim analysis -- excuse me, sale-by-sale analysis.

7 MS. ATWOOD: Okay. Thank you, Your Honor.

8 THE COURT: The next argument is that claims related
9 to completed logging are moot. And it's not so much that it's
10 moot, it's that it's not on the table. So I am -- I don't need
11 to hear further argument on that. I deny the motion on the
12 theory of mootness, but agree that there aren't claims in the
13 case about completed logging.

14 The next argument seeks to dismiss parts of the
15 complaint related -- or requesting relief to stream buffers,
16 related to stream buffers.

17 There's really a pair of arguments about stream
18 buffers. One is that I ought to strike several parts of the
19 complaint regarding stream buffers as immaterial under Rule
20 12(f). And I generally think that's not the case. I don't
21 read the complaint as seeking to impose on the State
22 defendants, for example, federal requirements about stream
23 buffers. Again, I think that the stream buffers in most
24 instances seek to just tell the causational story, and stream
25 buffers are a part of telling the causational story here.

1 So I deny at the motion to strike level almost all of
2 what defendants have requested.

3 There is at paragraph 64 just a single reference that
4 references a federal recovery plan for a geographically
5 distinct group of salmon, and so that does, in my view, become
6 immaterial even to the telling of the causational story here.
7 So I grant the motion to strike paragraph 64.

8 And there is the suggestion by defendants that the
9 aerial photograph in paragraph 113 is not in their challenged
10 land. I don't know if you've had a chance to look at paragraph
11 113 any further.

12 MS. ATWOOD: Yes, Your Honor. And the plaintiffs
13 apologize for the inconvenience and to the State for having to
14 verify that. My understanding is that there was an error
15 interpreting our mapping, but these particular points that were
16 in those sales are on the kind of terrain that we're talking
17 about, utilized road construction methods that we're talking
18 about, and were very close to the state lands. That said,
19 we're happy to remove those photographs and replace them with
20 something that illustrates the problem on the state forest.

21 THE COURT: All right. Then I do grant the motion to
22 strike the aerial photographs of landslides included in the
23 complaint at paragraph 113, and otherwise deny the motions to
24 strike.

25 The other argument isn't a motion to strike, it's to

1 dismiss really on the idea that features of landscape that
2 aren't currently habitat aren't really protected under
3 Section 9. And so that's a series of cases involving owls and
4 others, and the idea that to allege -- even to accurately
5 allege a claim under Section 9, you've got to allege habitat
6 currently being utilized by the threatened or endangered
7 species.

8 And that's sort of got an interesting application
9 here. I don't think those cases apply to our case, our theory
10 of the complaint here. It's true that the standing trees that
11 if logged fail to become fallen trees and habitat while they
12 are standing are manifestly not coho salmon habitat. That
13 would be -- I'd like to see that case. But the theory is an
14 adequate one under Section 9, that you're taking away future
15 habitat in a way that I don't think it's fair to apply those
16 other cases or that principle to this complaint, so I deny the
17 motion to strike or dismiss paragraphs related to stream
18 buffers on the idea that in their present condition they're not
19 currently coho habitat.

20 There is a motion for a more definite statement,
21 which I think I already covered under the sale-by-sale ruling
22 I've made.

23 And lastly there's a motion for judicial notice. The
24 documents being sought for judicial notice are the classic
25 sorts of documents on which I'd normally take judicial notice,

1 except that I don't see anybody relying on them here. So that
2 is an element of judicial notice, that it has to be something
3 you're relying on. Can you help me with that?

4 MS. WESTON: Sure, Your Honor. The State's motion
5 relied on those to sort of tell the background of what -- how
6 the State applies this robust program of protective measures
7 that involves sort of rules and standards about roads and how
8 we do leave trees on steep slopes and so forth.

9 THE COURT: Well, you relied on them by --

10 MS. WESTON: Citing them.

11 THE COURT: -- quoting those things in your brief?

12 MS. WESTON: And then in -- with respect to the
13 federal documents, it was in making our arguments as to why
14 those materials are relevant, we wanted to make sure that the
15 document we were talking about was also before the Court. I
16 don't know that it's critical that they in fact be in the
17 record. It was more for the convenience of the Court.

18 THE COURT: To be clear, you're not asking me to take
19 into account any portion of those documents that's not already
20 in your pleadings today?

21 MS. WESTON: No, sir.

22 THE COURT: If I just take into account those
23 portions of those documents, do you have any objection?

24 MS. ATWOOD: Not at this stage, Your Honor. I would
25 just ask that we not be barred from quoting other potentially

1 relevant aspects of the recovery plan in our brief.

2 THE COURT: No, not at all.

3 So I will -- I will rely on the portions of those
4 documents cited in the briefing to me here already. I'm not
5 going to take judicial notice of them, which actually brings
6 into the record those entire documents, only because the entire
7 documents aren't anything the parties are advancing towards me
8 today. That doesn't mean that in the future both sides aren't
9 free to pull in more of those documents. I'm just ruling on
10 what I have in front of me here today.

11 Anything further from plaintiff?

12 MS. ATWOOD: I do want to just make sure the Court is
13 aware of all of the case law that says that the Court maintains
14 its full scope of equitable discretion when fashioning the
15 appropriate injunction if and when we get to that point,
16 notwithstanding some of the earlier topics we've discussed
17 today.

18 THE COURT: Are you talking about the limits of the
19 Eleventh Amendment or something else?

20 MS. ATWOOD: I am talking about -- it's within the
21 context of the Eleventh Amendment argument that they're making,
22 and I just wanted to point the Court to some of the cases that
23 discuss how under both the ESA and the *Ex parte Young* doctrine,
24 the Court does retain the full scope of its equitable powers.
25 And if you would like, I could read you some of the various

1 injunctions that courts have issued with the express
2 understanding that they are not so limited, so that the *Ex*
3 *parte Young* doctrine does not allow the Court to entertain any
4 cases except for prospective relief against state officers
5 violating federal law. That does not restrain the Court's
6 equitable discretion.

7 THE COURT: Well, we're a long way from that day.

8 MS. ATWOOD: I know.

9 THE COURT: But I am well aware that I have awesome
10 powers. All right?

11 Anything further from the now very nervous State
12 defendants?

13 MS. WESTON: Excuse me, Your Honor.

14 If I could just go back for a moment to the stream
15 buffers issue. The State's argument is not that trees are
16 salmon habitat. The State's argument is that Section 9 does
17 not require the State to create future habitat, and failure to
18 protect future habitat is not a Section 9 violation.

19 And the other issue on the stream buffer question is
20 that we had two reasons for wanting to dismiss any claim that
21 was alleging a Section 9 violation based on failure to input
22 large woody debris into the streams, one of which was, in our
23 view, the complaint doesn't fairly put us on notice that that's
24 plaintiffs' actual allegation of a chain of causation for a
25 Section 9 claim, and the other was our legal argument that

1 creating future habitat is essentially a recovery function;
2 it's not a Section 9 take claim.

3 And so I guess I'm left with the question of are we
4 litigating the width of our buffers or are we not on this
5 complaint. And in their response, I was -- it failed to
6 clarify that issue for the State.

7 THE COURT: I don't see this case as one litigating
8 the width of riparian buffers. Certainly -- well, I don't see
9 it as litigating that, the width.

10 I do see live as a possibility in this case something
11 that you may view as creating habitat but which I see
12 differently, and that is whether logging near streams that by
13 virtue of logging eliminates trees that would have fallen and
14 become habitat can be a viable Section 9 claim.

15 Is that a principle you disagree with?

16 MS. WESTON: As a matter of law, Your Honor, it's our
17 position that failing to protect trees that might grow and some
18 day become habitat for a listed species, we think that's
19 inconsistent with the way that the U.S. solicitor general has
20 on behalf of the services interpreted Section 9, and
21 particularly the habitat modification regulation, and also with
22 the case law that says that we need to be talking about
23 identified species that are here now for a Section 9 take claim
24 to exist.

25 And I understand the Court's ruling, but that's

1 our -- I want to make sure our argument is clear. And in the
2 complaint, the mechanisms of take that they allege are logging
3 on steep slopes and hauling those logs on roads that are
4 hydrologically connected. They don't allege as a mechanism of
5 take failure to ensure that large wood enters these streams.
6 And if that's the argument, we would ask that that be clarified
7 in the complaint and they say that out loud. And this
8 obviously is a legal issue that we will preserve and continue
9 to dispute where we can.

10 THE COURT: Thank you.

11 MS. WESTON: And one other question --

12 THE COURT: Let me take that up first and come back
13 to you. I'm going to talk to your opponent about that, and
14 I'll come back to your other question.

15 So that raises two questions. One is whether in fact
16 you are not litigating the width of riparian buffers in this
17 complaint. Is that correct?

18 MS. ATWOOD: Yes, Your Honor. That would be a
19 policy-level challenge.

20 I have three points about the stream buffers and the
21 related issue of large woody debris. One is that yes, you're
22 right, Your Honor, they are habitat. In fact, that's exactly
23 what the service said in the preamble to the final special
24 rule. I would encourage the Court to take a look at that,
25 because the special rule expressly contemplates logging and

1 removal of large woody debris and the loss of riparian canopy
2 cover. So it is habitat. As soon as it is removed, that
3 habitat has been impaired at the very least because it is
4 canopy cover, but it also is habitat, according to the National
5 Marine Fisheries Service, that will be very important for the
6 recovery of the species.

7 And then --

8 THE COURT: So is that a method of take that you are
9 alleging or going to allege in an amended complaint?

10 MS. ATWOOD: Yes, Your Honor. We will make that very
11 clear in our amended complaint.

12 THE COURT: It's not clear in the current complaint.
13 So I think in terms of being clear, you're going to want to
14 allege that one of the ways take or harm, harassment or
15 whatever occurs is -- if that's what you're going to do, this
16 method of take.

17 MS. ATWOOD: I am going to do that, Your Honor.

18 THE COURT: All right. Thank you.

19 MS. ATWOOD: And just one other point, if I may.

20 THE COURT: Go ahead.

21 MS. ATWOOD: We are alleging harm, and certainly
22 that's a central component of our take theory. We also are
23 alleging harassment, which has a different definition, and the
24 courts have said where harm may not apply, even if you're going
25 to entertain that idea, then there's still the possibility that

1 it's harassment.

2 THE COURT: All right. I understand that. I think
3 what the State is asking at the pleading stage that I agree
4 with is that there has to be a close and careful connection
5 between the things that you describe as harmful to fish and the
6 ways in which you allege the State is engaging in a violation
7 of the statute.

8 Sometimes you've alleged negative impacts without
9 connecting them up to theories of statutory violation. So
10 those have to be carefully tied together.

11 Your next question?

12 MS. WESTON: Yes, Your Honor.

13 The final component of our motion to dismiss was that
14 the Court dismiss the complaint to the extent it seeks to have
15 the Court order defendants to obtain an HCP/ITP on an
16 enforceable timeline.

17 THE COURT: I don't read the complaint that way. To
18 the degree that ever becomes what plaintiffs' theory is, I
19 agree with you that that is not something I have the power to
20 order the State to do.

21 MS. WESTON: Thank you, Your Honor.

22 MS. ATWOOD: May I just note one thing regarding
23 that, Your Honor?

24 THE COURT: Yes.

25 MS. ATWOOD: Many courts have ordered states to apply

1 for an ITP by a date certain, exercising their injunctive --
2 I'm sorry, their equitable authority.

3 THE COURT: But that, of course, is at the relief
4 stage after victory, not something you're alleging in the
5 complaint, right?

6 MS. ATWOOD: That's right. I'm just pointing that
7 out.

8 THE COURT: I understand that you think that the
9 equitable powers I have upon your ultimate victory may be
10 larger than what would be allowed at the complaint stage. I'm
11 going to stick to the complaint stage now, and I agree that you
12 cannot seek via complaint for me to order the states to get an
13 ITP.

14 MS. ATWOOD: And the complaint as currently drafted
15 does not ask for that. I simply point out that some courts
16 have ordered state agencies to apply -- not necessarily obtain
17 but to apply for an ITP.

18 THE COURT: Thank you.

19 Anything further from any defendant?

20 MR. WALDRON: Your Honor, I just want to actually
21 thank you on behalf of Tillamook County for letting us know
22 your thinking as you go along. Because there's going to be a
23 lot more motions, and this potentially has such a devastating
24 effect on the school system or the county, that the
25 commissioners need to plan as we go through this case for the

1 future.

2 THE COURT: You're welcome.

3 So the reason that we've had this discussion, which
4 is different than most hearings where I just hear arguments and
5 rulings, is that we're trying to set out the parameters by
6 which an amended complaint doesn't result in just a second
7 round of the same arguments. So I think it's useful to go
8 ahead and sort of work that out in advance. Otherwise, you
9 know, we just do the same thing all over again, to everyone's
10 cost and detriment.

11 So I hope that we've given plaintiff some guidance by
12 which it could weave a path to craft a complaint that while it
13 will certainly face other challenges, will not face the same
14 ones all over again.

15 We'll be in recess.

16 THE CLERK: Court is in recess.

17 (Proceedings concluded at 11:37 a.m.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

February 26, 2019

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

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